

Supreme Court, U. S.
FILED

JUL 5 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. **78-37**

DEWAYNE F. TITUS,
Petitioner,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

ORRIN LEIGH GROVER

611 Front Street

San Francisco, California 94111

Attorney for Petitioner

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	3
1. The health of the petitioner	3
2. The transactions and the evidence	5
The Dymo stock	6
The sale of the twenty acre parcel	6
3. The investigation of the petitioner	8
4. The nature and the course of the lower court proceedings	11
Reasons for granting the writ	12
I	
Preindictment delay	12
1. The state of the law	12
2. The instant case provides this court with an opportunity to adjust the measure for actual prejudice under Marion	17
3. The prejudice resulting from factors other than the loss of witnesses and testimony	20
Conclusion	21

Appeals (Pet. App. A) denying the petitioner's petition for rehearing, with the suggestion for rehearing *en banc*, is unreported. The judgment of conviction by the District Court is also unreported (Pet. App. C).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1978. A timely petition for rehearing with the suggestion for rehearing *en banc*, was denied on May 25, 1978. A motion for an extension of time for an additional ten days in which to file the petition for certiorari (through and until July 5, 1978) was filed with this Court on June 26, 1978. A ruling on that motion has not been received as of the time this petition is being transmitted to the printer. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper standard for determining whether or not the petitioner had suffered actual prejudice as a result of preindictment delay and for determining whether or not the petitioner had been denied Due Process as a result of preindictment delay?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property without due process of law * * * .

STATEMENT

1. The Health of the Petitioner.

The issues of this appeal turn, in significant part, upon the issue of the petitioner's health.

The petitioner is a 53 year old businessman who has lived in the San Francisco Bay Area for a number of years. He was one of ten children, eight brothers and two sisters; both of his parents are dead of heart related ailments. His surviving brother is in a permanently disabled condition from heart disease. All of his remaining brothers have died of coronary related ailments. Both of the petitioner's sisters are victims of chronic hypertension.

In 1959, DeWayne Titus began having difficulties himself with heart disease.² It began with heart and chest pains and developed into a condition requiring repeated hospitalization and regular supervision by a cardiac specialist. In 1972, he was diagnosed as suffering diffuse coronary disease. However, his condition worsened, and he was hospitalized for a second time in November of 1973.

The petitioner's health continued to deteriorate thereafter. He experienced pains in his chest, angina pectoris, growing to five and then more seizures per day. Finally, just after the indictment was handed down in this case,

²Pet. App. D, E & F include reports of three physicians with regard to the petitioner's health. Pet. App. D is a letter report of the cardiologist appointed by the Court at the time that he determined the defendant could stand trial under certain conditions. App. E contains the letter of the petitioner's personal physician submitted at the request of the District Court after the petitioner suffered a collapse on the eve of the scheduled trial date in the summer of 1975. App. I is the testimony of a defense cardiologist which was presented at the sentencing hearing in July, 1976.

DeWayne Titus underwent surgery for a coronary bypass. The operation was labelled a success. Within two months of the operation, his health began to deteriorate again, and the petitioner developed a condition referred to as "unstable angina pectoris." The petitioner's general condition was characterized as becoming highly critical.

The manner in which the unstable angina pectoris was controlled was by progressive increases in the dosage of certain drugs. During this period, the District Court found it necessary to recess for a time in order for the petitioner to regain stability. When stability was obtained, the number of daily episodes of angina pectoris had risen to between ten and fifteen. Since the angina had stabilized, however, Dr. Elliot Rapaport, a court appointed physician who examined Titus when he had moved to dismiss the indictment because of his poor health, indicated his opinion that it was "reasonable to go ahead [with trial] judiciously" so long as certain restrictions in the conduct of the trial were followed. (Pet. App. D). Dr. Rapaport's conclusion was disputed by Titus' attending physician, Dr. Roger Johnson. These opinions were rendered in May, 1975.

On June 19, 1975, eleven days after his motion to dismiss the case was heard, and awaiting trial scheduled for July 7, 1975, Titus suffered a new, unexplained heart episode. He was rendered unconscious and was taken by ambulance to the hospital where he was confined for ten days. That is, two years after Titus' first experienced unconsciousness, nine months after Titus had undergone "successful" surgery, and almost immediately after a court appointed specialist had concluded that he was fit

for trial, DeWayne suffered a cardiac episode of such intensity that it rendered him unconscious and required hospitalization. Mr. Titus remained in the hospital until June 28, 1975. The commencement of the trial was postponed until September 15, 1975. Between June and September 1975, further tests and evaluations of Mr. Titus' health were made which at no time improved. (Pet. App. E). The record in this case clearly establishes that Mr. Titus suffers from an irreversible cardiac condition of the severest magnitude. Dr. Leonard Karpman, a specialist in cardiology at Kaiser Hospital in San Francisco, testified that Mr. Titus' cardiac condition is one of the worst he has ever diagnosed, and is beyond medical remedy. Mr. Titus' condition requires constant and sophisticated medical attention and medication. Dr. Karpman testified that it was a "medical miracle" that Mr. Titus was able to survive his trial. (Pet. App. F).

Dr. Karpman testified that if Titus was required to serve a prison sentence, his already deteriorated health would be exacerbated and early death, a certainty. Nevertheless, the District Judge sentenced DeWayne Titus, although he had no prior criminal record, to two years imprisonment.

2. The Transactions and the Evidence.

There are five counts in the indictment upon which Titus was tried. The overwhelming bulk of the tax liability in this matter involved two transactions.³

³In dispute between the petitioner and the United States is a tax liability of approximately \$250,000. All but a few thousand dollars of this tax liability rests on the findings regarding the two transactions discussed above. The balance of the transactions which were the subject of the indictments uniformly included

The Dymo Stock

The finding of the District Court of guilty on the second count rested exclusively on its finding that the defendant failed to report a significant portion of the income from the sale of the stock of Dymo Industries which took place during 1967. The issue before the trial court was essentially one of whether or not Mr. Titus had intentionally or through gross negligence withheld from his accountant, Robert Greer, the proper information upon which to compute the basis for his purchase price of the Dymo stock.

The Sale of the Twenty Acre Parcel

At the beginning of 1968, DeWayne Titus, in joint tenancy with his wife, owned a parcel of land located in Alameda. In September of that year, Del Monte Corporation began secret maneuverings by which it intended to purchase that property. The property was ultimately purchased by Del Monte Corporation in January, 1969. During the fall of that year and, before Titus had any knowledge that there was a pending sale* to Del Monte Corporation, Titus sold the property under an installment sale contract to a corporation which he owned, Barbary Coast. The court found Titus guilty of offenses relating to this transaction on two counts:

1. In Count Four, the District Court found Titus guilty of falsely reporting the installment sale transaction

instances where the testimony of Robert Greer was used, almost exclusively, to establish that Titus had willfully failed to communicate information to Greer necessary for the preparation of correct tax returns.

*Titus' prior knowledge was the subject of bitter dispute and was the source of extreme prejudice to Titus as a result of the preindictment delay.

to Barbary Coast in 1968 though the government never contested that a legally binding sale under the California law took place;

2. In Count Five, the District Court found petitioner guilty of failing to report the income received from the sale of the property between Del Monte and Barbary Coast which occurred in 1969 on his 1969 income tax return.

The government's proof of Titus' guilt in this transaction rests upon the following:

1. Testimony regarding the meeting where the sale to Barbary Coast was allegedly conceived as a plan to commit tax fraud;

2. The government's attempt to cast doubt upon the recorded and binding sale contract between Titus and Barbary Coast which was recorded in Alameda County; and

3. The testimony of Richard Thomas, who assisted in the preparation of Titus' 1968 and 1969 income tax returns regarding information which was allegedly intentionally withheld by Titus.

The evidence regarding these transactions hinged upon the testimony of Robert Greer who was a reformed alcoholic, and, to a lesser extent, on the testimony of Richard Thomas. Robert Greer was the accountant who prepared the 1967 tax return, the return involving the Dymo stock transaction, and who was present at the "Barbary Coast meeting," and who was present and was a principal witness against Titus with regard to the alleged conspiracy which took place at that meeting. In substantial part, the factual issues in this trial boiled down to a

resolution of the conflicts in testimony between that of Robert Greer and that of the petitioner, DeWayne Titus. The testimony of Richard Thomas was also of importance in this trial because Mr. Thomas was the accountant who prepared the actual and/or amended returns for the years 1968 and 1969. As will be discussed, *infra*, Mr. Thomas' recollection was severely hampered by the period of delay between the actual time of his work and the time of the trial. Also during that period, a substantial portion of his papers were lost and he was unable to refer to them to refresh his recollection with regard to his transactions with Mr. Titus and his staff.

3. The Investigation of the Petitioner.

The Internal Revenue Service began its investigation of the tax affairs of DeWayne Titus in 1965. The Internal Revenue Service escalated its investigation in August, 1970, when IRS Agent Ronald C. Williams began an intensive investigation of Titus' 1967 and 1968 personal tax returns. Titus was informed of the investigation on September 4, 1970, by Agent Williams and during September, 1970, Titus pressed the agent to hasten his investigation and to bring it to a conclusion. In December, 1970, the agent called Titus regarding the investigation and gave *Miranda* warnings. From that date on, Titus' attorney, Gordon Nelson, continued to provide the IRS agent with various documents requested by him, although Titus himself had personally refused to hand them over.

On February 16, 1971, Titus filed his 1969 income tax return. Since Titus' IRS file was red tagged, meaning

that a criminal investigation was in progress, the return was forwarded directly to Agent Williams. On March 2, 1971, a summons was issued for Titus' corporate records. Attorney Nelson turned those records over to Agent Williams on March 28, 1971.

In October, 1971, Agent Williams met with Richard Thomas, the accountant who had prepared Titus' 1969 income tax return. Titus had no knowledge of that meeting.

In March, 1972, Titus wrote Agent Williams expressing anxiety over the long-delayed investigation of him and over continuing rumors of a pending indictment. Titus told Williams he suffered from a debilitating and progressive heart disease which was aggravated by this anxiety. The government waited eight months until it made any inquiry on its own regarding the status of Titus' health.

On November 27, 1972, Williams and another IRS agent met with Titus and accountant Thomas in order to have Titus explain items in the tax returns under investigation. On November 28, and December 6, 1972, the government finally questioned Titus' attending physician and another specialist and was informed that Titus' condition was progressively deteriorating. The doctors said that Titus could not stand trial because of the stress involved.

In December, 1972, Agent Williams ended his investigation and forwarded his conclusions and recommendations to his superiors. In that report, he included information concerning the state of Titus' health. On December 29, 1972, William D. Howard, Chief of Intelligence for

the IRS, wrote a letter recommending prosecution of the petitioner. (Pet. App. H). Despite information concerning the adverse effect of anxiety on Titus' health, the file was passed among various federal bureaus for approval over the period of the next fourteen months. We know from the affidavit of John M. Youngquist, Assistant United States Attorney, that it was not until July 25, 1973, over six months after Agent Williams concluded his investigation, that the file was forwarded by the Internal Revenue Service's Office of Western Regional Counsel to the Department of Justice in Washington with a recommendation for prosecution. (Pet. App. I). From that date until February 19, 1974, the case was under further review by the Criminal Section of the Tax Division of the Department of Justice in Washington. On February 19, 1974, the Department of Justice returned the case to the Office of United States Attorney for the Northern District of California. Finally, there was a delay of another seven months until July 24, 1974, when presentation of the case to the grand jury began. The indictment was returned on August 7, 1974, nineteen months after the completion of the investigation. No further investigation was done by the Internal Revenue Service or by the Department of Justice after December, 1972.⁵

Since 1971, three material witnesses to the defense had died. These persons were Eileen Emmons Smith, Fred Bitterman and Warren Haskell. Haskell and Bitterman died in 1972, nearly two years after Agent Williams had

⁵That is, after the completion of Agent Williams' investigation, which took twenty-eight months, and the other Intelligence and IRS investigations which had been going on since 1965.

told the petitioner of the existing Internal Revenue Service investigation. Eileen Emmons Smith died in October, 1974, forty-five months after Agent Williams had given Mr. Titus his *Miranda* warnings and two years after the indictment was returned. In addition to the witnesses that had died, three other witnesses who had played a significant part in the prosecution were unable to recall all or part of the events relating to the transactions which were the subject of the prosecution. J.B. Kidwell, an officer of Eureka Federal Savings and Loan, had, by the time of the return of the indictment become too aged and infirm to remember the events which occurred in 1968 and 1969. Two of Titus' accountants, Robert Greer and Richard Thomas, were unable to recall events which were at the heart of the transactions which were the subject of this prosecution. The work notes and papers of both accountants had been lost during the intervening five to eight years between the events and the time of the trial.

4. The Nature and the Course of the Lower Court Proceedings.

A five count indictment charging violations of the Internal Revenue Code, 20 U.S.C. Sections 7201 and 7206, was returned against DeWayne F. Titus on August 7, 1974. Titus was admitted to bail in the amount of \$50,000 on August 9, 1974. At subsequent hearing, in September, 1974, Titus was released on his own recognizance.

Immediately after being released upon his own recognizance, Titus was forced to undergo coronary vein bypass surgery in September, 1974. Following the surgery, petitioner was permitted to recuperate until January, 1975, at which time the court appointed a cardiologist, Dr. Elliot Rapaport to evaluate the petitioner's physical

condition. After the completion of the evaluation, the Court recessed proceedings for additional time until May, 1975.

In May, 1975, after a hearing in which the two physicians, Dr. Elliot Rapaport and Dr. Roger Johnson, rendered opinions that disagreed on whether or not the trial should proceed, the District Court set the trial to commence in July, 1975. Before the trial could commence, on June 19, 1975, the petitioner was rendered unconscious and rushed to the hospital where he remained for ten days. The commencement of the trial was delayed until September, 1975.

Once it had commenced, the trial proceeded with two to four hour sessions over a period of seven months. The findings of the Court were rendered in May, 1976.

The judgment of the District Court was entered on July 27, 1976 in which the District Court sentenced Mr. Titus to two years imprisonment on each count of the indictment, to be served concurrently, and fines totalling \$18,000.

REASONS FOR GRANTING THE WRIT

I

PREINDICTMENT DELAY

1. The State of the Law.

This Court established, in *Marion v. United States*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) that preindictment delay is to be measured by the Due Process Clause of the Fifth Amendment to the United States Constitution. In that decision, the Court did not establish a test but instead urged:

To accomodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case. It would be unwise at this juncture to forecast our decision in such cases. *Id.* at 325."

The development and evaluation of pre-indictment delay has been at best, erratic since that time. Confusion in the circuits was immediately engendered in establishing the constitutional measure of pre-indictment delay. Most courts have fixed upon the government concession from *Marion* as marking the elements of the test. The diversity begins there.

The Fifth Circuit has applied the elements using the subjunctive; that is requiring *both* prejudice *and* intentional delay to find a violation; *United States v. Duke*, 527 F.2d 386, 390, cert. denied 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1190 (1976). The Third Circuit has applied the test in the disjunctive, considering only the issue of prejudice. *United States v. Dukow*, 453 F.2d 1328, 1330, cert. denied, 406 U.S. 945, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972). The District of Columbia Circuit⁷ has applied both tests.

⁶In another portion of the opinion of the Court, there was quoted a concession from the Solicitor General which has engendered much of the controversy:

Thus the government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at the trial that the preindictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. *Id.* 324. See *United States v. Mays*, 549 F.2d 670, at 675 (1977).

⁷Compare *United States v. Parish*, 152 U.S.App.D.C. 72, 468 F.2d 1129, 1132, cert. denied, 410 U.S. 951, 93 S.Ct. 1430, 35 L.Ed.2d 690 (1973), and *United States v. Pollack*, 175 U.S.App. D.C. 227, 534 F.2d 964, 969 (1976).

The Ninth Circuit has applied both tests and has also created a third test.⁸

Of equal importance with the conflict over "subjunctive v. disjunctive" is the test which is evolving in the determination of what constitutes "substantial" or "actual" prejudice. The evolving rule places the burden on the defendant to establish this element irrefutably, *United States v. Mays, supra*, at 677-680.

The standard applied by the circuit courts, such as that in *Mays*, imposes a responsibility upon the defendant which it is impossible for him, as a practical matter, to meet. Restated, the defendant's burden, is to establish independent of his own testimony⁹ that lost witnesses, testimony and documents are exclusively favorable to him.

But the best analysis of the burden placed on the defendant by the Court in *Mays* and in other cases (and on the petitioner here) is reserved to Judge Ely, who dissented in the *Mays* decision:

My Brothers strain to the uttermost limits in arguing that the death or dimmed memories of potential defense witnesses does not *actually* prejudice a defendant unless he can demonstrate the extent to which those witnesses would have testified, respectively, had

⁸Compare *United States v. Sand*, 541 F.2d 1370, 1373 (1976) and *United States v. Andros*, 484 F.2d 531, 533 (1973) (subjunctive) *United States v. Mays, supra*, at 677-678 creates a balancing test.

⁹The *Mays* court found the defendants' affidavits to be without merit as being "self-serving." *Mays*, at 679. In a cryptic footnote the Court states: "The lack of supporting evidence would perhaps not be considered *so adversely* to the defendants in a situation where they had no notice of the possibility of criminal indictment." *Id.* at fn. 17. (Emphasis added).

"No notice." Is the Court of Appeals somehow implying that some bizarre extension of the mitigation of damages doctrine applies in a Due Process context?

they lived or their memories remained unobscured. The obvious question, as the majority recognizes, is in what manner can the defendant show the particular witnesses no longer available or laboring under stale memories could enhance his defense if the government had proceeded through indictment judiciously? (Citation omitted). "In a very real sense the extent to which he was prejudiced is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." (Citation omitted). The obvious answer, in the overwhelming number of cases is, I should think, that the burden of summoning affidavits from buried bodies or dimmed minds will be insurmountable.

The practical impossibility of meeting a burden, I concede, does not suggest necessarily that the burden is erroneously defined. *Id.* at 682.

It is often urged in this same context, as a counterweight, that "delay works against the government as well as the defendant." The due process guarantee is not offered to the government but, rather, to the defendant. It is the defendant, rather than the state who is to be protected from the overstale prosecution resulting from government malignance or underbudgeting.¹⁰

Most relevant, such glibness ignores the underlying premise that the judicial process is designed to determine truth from the evidence. Where the government's evidence is stale, as well as the defendant's the prejudice to the system is doubled rather than "halved" or "erased."

¹⁰*Mays, Dissent, supra*, at fn. 3.

In his articulate dissent, Judge Ely in the *Mays* case took time to propose a most-acceptable alternative to the test established by the majority in that case and applied to the petitioner herein: "The question for the trial judge should *not* be whether the record viewed in light of independently proved potential testimony of now-deceased witnesses, indicates that the defendant is either guilty or innocent as charged. Rather, the inquiry should be whether that determination can be made, ultimately, in a form wherein the judge has confidence that the pertinent transactions can be reconstructed accurately." *Id.* at 682.

In Judge Ely's determination, he would measure the defendant's showing of *materiality* of the missing testimony or documents rather than measuring, or "attempting" to measure whether or not those missing elements can *absolutely* be shown to prove the defendant's innocence. Judge Ely would also permit the government to rebut any showing of prejudice by a showing on its part that the missing evidence for testimony was wholly inculpatory.¹¹

Finally, though not specifically discussed in either the majority opinion or the dissent in the *Mays* case, a rule which requires the defendant to prove beyond peradventure that the missing evidence is wholly exculpatory ignores one of the most important and time-honored elements of the adversarial process: cross-examination. It is well known to every trial attorney that even the most inculpatory affidavit cannot always withstand the withering fire of cross-examination. What more telling evidence

¹¹Such a rule would have a dual purpose in that it would encourage the government to further explore all avenues of evidence and to preserve evidence rather than to destroy it.

of innocence can there be for a defendant than devastation of government witnesses by cross-examination?¹²

2. The Instant Case Provides this Court with an Opportunity to Adjust the Measure for Actual Prejudice Under Marion.

The prosecution in this case offers this Court the opportunity to establish in a very clear and specific manner, the test to be applied for actual prejudice, not only for missing evidence, but also prejudice as a result of other factors.

Between the time of the commencement of the IRS investigation, and a period of time two months after the return of the indictment, three critical witnesses died.

Two of those witnesses, Warren Haskell and Eileen Emmons Smith, were directly involved in bookkeeping and accounting responsibilities for the defendant.¹³

Under the test which Judge Ely would have us apply, the petitioner here has suffered actual and substantial

¹²One could even feel that the majority opinion in the *Mays* case has studiously ignored this possibility. In its comments, at page 680, the majority writes "As it stands now, a trier of fact might well assume that the decedents would have placed *all* of the blame on the defendants as to assume that they would have *exonerated* them." A statement such as the one quoted, ignores the possibility that, after the decedent witnesses had testified that the defendant was wholly *culpable*, sharp cross-examination may have shown that, in fact, their testimony was wholly *incredible*. The effect of such a showing on a jury would be very likely to lead to acquittal.

¹³During the proceedings on the District Court level, the strict importance of Mr. Haskell alone was discussed. It was conceded at that time, that before the death of Eileen Emmons Smith, any testimony Mr. Haskell could have provided regarding the knowledge and responsibility of the petitioner concerning the preparation of his individual income tax returns and the details of his financial affairs, could have also been provided by Eileen Emmons Smith. Her death, in October, 1974, less than ninety days after the return of the indictment, made that impossible.

prejudice. The substance of three of the five counts in the indictment is based upon transactions similar to that involving the Dymo stock transfer. That is, that certain incomes, such as rents, which the petitioner had received, were not properly reported or were not reported at all on the petitioner's income tax returns for 1967 and 1968. A hotly contested issue at trial was whether or not the failure to report those items was the result of the negligence of Robert Greer, perhaps generated by his alcoholism, or were the result of the intentional or gross negligence on the part of the petitioner. To these transactions (the reporting or non-reporting of the incomes by the petitioner) Eileen Emmons Smith and Warren Haskell were the persons who had the closest and most intimate knowledge outside of the petitioner himself. Particularly Mrs. Smith played an important and close role as Mr. Titus' personal accountant, personal and chief bookkeeper. Mrs. Smith's involvement in the affairs of Mr. Titus permeates the record. For example, Mr. Greer admitted during his examination that Mrs. Smith was the person who made the entries in the check register upon which he based his judgment that DeWayne Titus owed additional rental income which was the subject of one of the counts of the indictment (RT 0615).¹⁴

At another point in the examination of Mr. Greer, Mr. Titus ineptly attempted to point out (RT 0527-0528) that Mrs. Smith would have been able to provide testimony concerning the alcoholism and the unreliability of Robert Greer.

¹⁴The abbreviation RT refers to the reporter's transcript of the case, which is on file with the Court of Appeals.

Richard Thomas, another "pivotal" prosecution witness also testified that he received information from Eileen Smith (RT 0818).

The information presented regarding Eileen Smith and Warren Haskell and their relationship to the dispute between the credibility of the petitioner and the credibility of Robert Greer applies equally to Fred Bitterman, another potential defense witness. One of the critical issues relating to the sale of the twenty acre parcel was whether or not the petitioner had, at the time he had allegedly conspired to evade the income tax from the sale, any knowledge whatsoever that the sale was pending. On this issue, the testimony of Fred Bitterman, who died before the return of the indictment, and the testimony of J. B. Kidwell, who was senile and unable to remember any of the relevant transactions at the time of the trial, would have been critical. These two gentlemen were officers of Eureka Federal Savings and Loan, the financial institution which transmitted Del Monte's secretly prepared offer to DeWayne Titus for the first time.

The petitioner was further hampered in the presentation of his case and in the cross-examination of witnesses in a serious way, by the faded memories of several key witnesses and by the numerous documents which were missing or unavailable at the time of trial.¹⁵

¹⁵Rather than consume the Court's time in further elaborating the detailed areas of actual prejudice to the petitioner with relationship to lost evidence, the petitioner has included as part of his appendix that portion of the supplemental transcript references provided to the Court of Appeals which related to the missing documents and/or testimony. (Pet. App. K).

3. The Prejudice Resulting from Factors Other than the Loss of Witnesses and Testimony.

The Statement of this Petition provides this Court a detailed statement of the petitioner's health condition. There was significant deterioration of that condition while the government dallied in prosecuting its case through an investigation of several years and through a nineteen month post investigation delay. Petitioner's Appendices D and E provide this Court with a description of that deterioration. By the time the petitioner was indicted, he was on the brink of open-heart surgery. How can a man constitutionally defend charges as serious as those levelled by the United States in this case when he cannot walk up stairs without chest pain?

That question raises the remaining issue of the petitioner's financial devastation. In the words of the government, DeWayne Titus had "hundreds of thousands of dollars at his disposal"¹⁶ in 1969. The delay in prosecuting Titus found him in 1974 without funds¹⁷ to pay for his defense.¹⁸

¹⁶Appellee's Reply Brief in the Court of Appeals, p. 55.

¹⁷The Court may judiciously notice that the petitioner filed a personal bankruptcy on June 21, 1976. (No. 3-76-788). Many of the companies Titus operated are now bankrupt as well.

¹⁸Titus requested that he have a court appointed attorney advisor and expert assistance pursuant to 18 U.S.C. 3006A. He, however, declined to provide financial information in open court or by public document because of the "assets" issues in the prosecution. The District Court declined to conduct an *ex parte* hearing to determine financial status and, instead, found a waiver. Mr. Titus obtained an attorney advisor after the trial commenced who is now a creditor in his personal bankruptcy for a considerable sum.

Whatever the course or motivation of the government delay,¹⁹ the indictment found Titus in 1974 without funds for a lawyer and in extremely poor health. Such factors could not help but drain one's ability to present a vigorous defense against ever-serious charges.

CONCLUSION

We ask the Court to affirm the words of Judge Ely:

[T]he negative power of the Government to withhold prosecution for tactical reasons is perhaps of greater *potential* harm than the affirmative power to prosecute because comparatively, it is much less protected against abuse.

In the case of DeWayne F. Titus, as in the instance of many defendants measured by the *Mays* standard, justice delayed is justice denied, and without redress.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ORRIN LEIGH GROVER

Attorney for Petitioner

June, 1978

¹⁹Despite the fact that the government could not decide whether or not to proceed criminally, the IRS actively pursued liens, particularly for various business taxes, and exacted 100% penalties. Their levies were an important factor in Titus' financial collapse.